

At last, a watershed in basic sanitation in Brazil

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Law 14.026/2020, Brazil's "New Basic Sanitation Legal Framework", which received presidential sanction with vetoes on July 15th, receives an enthusiastic welcome. There are enormous expectations around the sector's ability to attract foreign and national investment that – at last – will establish the groundwork for universalization of basic sanitation services in this country.

The expectations are fed by various factors. For example, the Framework Law presents a simple and creative solution for federalizing regulation of an activity that falls squarely within municipal and/or state jurisdiction: it expands the regulatory jurisdiction of the National Waters and Basic Sanitation Agency (ANA – Agência Nacional de Águas e Saneamento Básico), giving it powers to establish general rules and regulatory standards in the basic sanitation sector, and making compliance with those standards an essential condition for federal financial support. Another step forward is that the legislation prohibits new "Program Contracts" (agreements for basic sanitation services made between public entities) without competitive bidding procedures. It also eliminates the need for public entities to indemnify private sector service providers for unamortized or undepreciated investments when services are transferred to a new provider, by stipulating that the indemnification must be paid by the new provider. Lastly, it expressly allows concession contracts to provide that any disputes that may arise will be settled by arbitration.

All of these factors contribute to an increased perception of legal certainty for potential investors in the sector, and tend to create uniformity in the main rules governing basic sanitation services throughout the country, which in turn encourages new private investments and reduces the fear of undue state interference. Not even the unexpected presidential vetoes were sufficient to upset the private

sector's positive expectations, although some of the vetoes were very poorly received by players in the public sector, especially Brazil's States, and run a serious risk of being overturned by Congress.

A Federal Agency for Basic Sanitation

It is no simple task to achieve regulatory uniformity and greater legal certainty in a sector where provision of services falls, by express provision of the Federal Constitution, to the Municipalities or, in the case of metropolitan regions, to the States as well. Regulatory fragmentation (there are more than 50 regulatory agencies in the sector) presents challenges in the structuring and implementation of projects, in the management of services and contracts, and for transparency, all of which ultimately creates barriers to attracting private investment.

Since the beginning of the debate over the new regulatory framework, "federalization" of jurisdiction over basic sanitation has been a central issue. The solution found, given the complexity of making changes to original jurisdictions fixed by the Constitution, was to expand the role of the ANA, which had been responsible for regulation and monitoring of the use of water resources, to include powers to establish regulatory standards for public basic sanitation services, which include supply of potable water, sewage systems, street cleaning, solid waste management, and rainwater drainage and management.

These standards are directed to municipalities and states responsible for providing basic sanitation services, along with state and municipal agencies for regulation and control of the services, and will deal with matters such as:

- standards for quality and efficiency in the services,
- universalization targets,
- service rates and pricing,
- criteria for regulatory accounting,
- the methodology for calculating indemnification for unamortized or undepreciated investments, and
- governance in regulatory entities.

Another dimension of the Legal Framework's pursuit of regulatory uniformity is the ANA's powers to establish the minimum content of contracts that delegate the provision of basic sanitation services to the private sector.

The key to success of the regulatory standards is in the incentive created by the Framework Law to encourage Municipalities and States to adopt the standards: only those that effectively adopt and comply with the standards will have access to federal funds and financing. The volume of federal funds historically directed to basic sanitation (an average of BRL 8.9 billion from 2007 to 2015¹) leaves no doubt of the incentive's strength.

The new legal framework falls short of resolving all the sector's problems, but it does have the potential to provide the increased regulatory stability and legal certainty needed to attract private investment and, even more important, reduce the deficit in the population's access to basic sanitation services in Brazil.

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